Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1976

\+ + + No. 76-614

BRIAN WILLIAM FIRTH, Appellant,

v.

GORDON THOMPSON, et al, Justices of the Supreme Court of the State of Nevada,
Appellees

\+ + + + + +

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Jerry Collier Lane
P.O. Box 2028
Carson City, Nevada
89701

Attorney for Appellant

Robert List
Attorney General
Supreme Court Building
Capitol Complex
Carson City, Nevada
89710

Attorney for Appellees

I

Jurisdiction attaches upon a timely filing of a notice of appeal. Appellant's failure to docket an appeal until 56 days after the expiration date of the 6-day period provided by Rule 13(1) is a defect which is not jurisdictional. Johnson v Florida, 391 US 596, 20 L Ed 2d 838, 88 S Ct 1713.

II

Although the Application for Extension of Time to Docket the Appeal was denied by the Honorable Mr. Justice Rehnquist, the application did contain an explanation of the fact that Appellant's counsel had telephoned the Office of the Clerk of the Supreme Court of the United States on September 16, 1976 to ascertain the status of the motion to admit him to the United States Supreme Court Bar, and was thereupon informed that admission had been granted three days earlier. With only four days remaining before the filing deadline, the application for a 60-day extension was mailed immediately, and the notice of appeal was driven by automobile for timely filing in San Francisco on September 17th. The delay during the early part of August in filing the motion for admission was caused by the paucity of United States Supreme Court Bar members residing in Carson City who were then available, and by the fact that one such member, one of Appellees' counsel, James H. Thompson, Esq., Chief Deputy Attorney General of Nevada, refused to sign such motion unless Appellant's counsel could assure him that no matters involving the State of Nevada as an adversary would be filed in the United States Supreme Court. Appellant's counsel could not give that assurance, for obvious reasons

III

Pages 3 through 6 of Appellees' Motion to Dismiss reveal a manifest lack of comprehension of the issues raised in this appeal, viz., those specifically set forth in Appellant's Jurisdictional Statement in Paragraph 1(c) at pages 1 through 3 thereof. Appellees, instead of addressing the federal issues raised, attempt to obscure such issues by setting forth a review of the circumstances involved in the underlying misdemeanor prosecutions in the state courts. (Pages 3-6 of Appellees' Motion to Dismiss.)

IV

The remaining pages of Appellees' Motion to Dismiss, pages 6 through 8, reveal the longstanding and continuing confusion among Appellees and the Office of the Attorney General of Nevada as to (1) appeal or appellate review, governed in Nevada by Article 6, Sections 4 and 6, of the Nevada Constitution, which provide for final appellate review in the district court as to matters arising in municipal or justice's courts, and (2) the substantive right of every person convicted in a municipal or justice's court, who meets the statutory conditions precedent, to have the Nevada Supreme Court rule upon the constitutionality or validity of the statute under which the conviction occurred. Such right, granted by the Nevada Legislature in 1939 (NRS 34.020(3)) has nothing to do with trial court errors or other aspects of appeals or appellate review, and therefore such statute does not contravene the aforementioned Article 6 of the Nevada Constitution. It merely provides the procedural device, a special statutory writ of certiorari, for having the highest echelon on the judicial branch of the government of the State of Nevada rule upon the constitutionality or validity of legislative acts, which, by mandate of Article 4, Section 21, of the Nevada Constitution, must be general and of uniform operation throughout the state. Compliance

with such mandate would be logically and legally impossible if the district courts for the 17 counties of Nevada were given the ultimate power to rule upon constitutionality or validity of state statutes. Thus, although not perceived by Appellees, (See page 7 of Appellees' Motion to Dismiss), NRS 34.020(3) is not "an attempt by the legislature to override the Constitution of the State of Nevada" but is instead an act by the legislature to facilitate compliance with Article 4, Section 21, of the Nevada Constitution. Further, no place exists in the law of Nevada whereby the Office of the Attorney General is empowered to determine constitutionality of state statutes, and, Appellees, sitting as the Nevada Supreme Court, have not held NRS 34.020(3) unconstitutional. Appellees' counsel is unquestionably without authority to do so.

V

In the first paragraph of Page 6 of Appellees' Motion to Dismiss, the admission is once again made that "the Nevada Supreme Court considered the merits of the appellant's Petitions for Writ of Certiorari," which, although proper under federal certiorari law and that in a minority of jurisdictions, is contrary to Nevada law, which requires a return, and a hearing on the return of the writ. It is at such hearing that the merits are to be considered, and not before. A petitioner under NRS 34.020(3) is to be provided his day in court before the state's highest tribunal in order to present the merits of his contention of unconstitutionality or invalidity of a state statute. Unfortunately, the United States District Court for the District of Nevada was inappropriately led down the same erroneous path and it applied federal certiorari law to an unwarranted consideration of the circumstances underlying the original state court prosecutions, instead of issuing a declaratory judgment in reference to NRS 34.020(3) and Appellees' conduct in reference thereto. The Ninth Circuit Court of Appeals fared no better on the point.

VI

The denial of Appellant's right to due process of law has been egregious in that Appellees have never afforded Appellant his day in court to argue the unconstitutionality or invalidity of any statute under which he had previously been convicted, notwithstanding a clear legislative mandate to provide such redress.

Therefore, Appellant asks this Honorable Court to deny Appellees' Motion to Dismiss.

Respectfully submitted this 3rd day of December, 1976.

JERRY COLLIER LANE
Attorney for Appellant

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PROOF OF SERVICE

I, JERRY COLLIER LANE, ESQ., Attorney for Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3rd day of December, 1976, I served a copy of the foregoing Brief in Opposition to Motion to Dismiss on the Appellees by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Robert List, Esq., Attorney General of the State of Nevada, Supreme Court Building, Capitol Complex, Carson City, Nevada 89710.

JERRY COLLIER LANE